Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

29

No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,
v.
MARC KASKY,
Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF *AMICI CURIAE* OF FORTY LEADING NEWSPAPERS, MAGAZINES, BROADCASTERS, WIRE-SERVICES, AND MEDIA-RELATED PROFESSIONAL AND TRADE ASSOCIATIONS (LISTED ON THE INSIDE COVER) IN SUPPORT OF PETITIONERS

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February 28, 2003

54 pp

LIST OF *AMICI*

ABC Inc.
American Booksellers Foundation for Free Expression
American Business Media
The American Society of Newspaper Editors
The Associated Press
The Association of American Publishers
Belo Corp.
Bloomberg L.P.
CBS Broadcasting Inc.
Cable News Network LP, LLLP
The California First Amendment Coalition
California Newspaper Publishers Association
The Copley Press, Inc.
Daily News, L.P.
Dow Jones & Company, Inc.
Forbes, Inc.
Fox Entertainment Group, Inc.
Freedom Communications, Inc.
Freedom to Read Foundation
Gannett Company, Inc.
The Hearst Corporation
Magazine Publishers of America, Inc.
The McClatchy Company
National Association of Broadcasters
National Broadcasting Company, Inc.
National Public Radio, Inc.
The New York Times Company
Newspaper Association of America
Newsweek, Inc.
PR Newswire Association LLC
Radio-Television News Directors Association
Reed Elsevier Inc.
Reporters Committee for Freedom of the Press
The Seattle Times Company
Silha Center for the Study of Media Ethics and the Law
Society of Professional Journalists
Time Inc.
Tribune Company
U.S. News & World Report, L.P.
The Washington Post Company

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The California Supreme Court's Decision, If Affirmed, Would Inhibit the Media's Ability To Report on Issues of Public Concern Regarding Corporate America. 4

A. The California Supreme Court's Definition of Commercial Speech Vastly Enlarges the Realm of Corporate Statements Subject to Regulation. 4

B. Application of California's Expanded Consumer Regulations Would Impair the Media's Ability to Cover Numerous Issues of Intense Public Concern. 6

C. Nothing Inherent in Individuals' Pursuit of Corporate Interests Justifies Imposing Special Burdens on Their Ability to Participate in Public Debates. 13

II. Expansion of the Commercial Speech Doctrine Beyond Statements That Do "No More Than Propose a Commercial Transaction" Is Unnecessary Because Media Coverage Adequately Informs Consumers Regarding Companies' Controversial Business Practices. 17

A. Corporate Communication with the Media, Unlike Traditional Product Advertising, Permits Public Scrutiny and Counterspeech. 17

B. The Media Coverage of Nike at the Center of This Case Confirms That Subjecting Its Speech to Consumer Protection Laws Is Unnecessary and Inappropriate. 22

C. This Court Should Make Clear That Speech That Does More Than Propose a Commercial Transaction Cannot Be Treated as Commercial Speech. 27

CONCLUSION 30

APPENDIX A, Descriptions of *Amici* 1a

APPENDIX B, Of Counsel Listing 11a

TABLE OF AUTHORITIES

CASES

Associated Press v. United States, 326 U.S. 1 (1945) 6, 21

Bates v. State Bar of Ariz., 433 U.S. 350 (1977) 18

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 14, 28

Branzburg v. Hayes, 408 U.S. 665 20

Central Hudson Gas & Electrical Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 28

Chern v. Bank of America, 544 P.2d 1310 (Cal. 1976) 5

City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) 28, 29

Connick v. Myers, 461 U.S. 138 (1983) 5

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 14

Cortez v. Purolator Air Filtration Products, 999 P.2d 706 (Cal. 2000) 5

Edenfield v. Fane, 507 U.S. 761 (1993) 2, 19

Estes v. Texas, 381 U.S. 532 (1965) 20

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 7, 14, 21, 22

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 19

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)..... 14, 20

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 7

Keyishian v. Board of Regents, 385 U.S. 589 (1967)..... 27

Leoni v. State Bar, 704 P.2d 183 (Cal. 1985)..... 5

NAACP v. Button, 371 U.S. 415 (1963)..... 27

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..... 7, 16, 18, 21, 26

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)..... 3, 18, 26, 29

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)..... 22

In re R.M.J., 455 U.S. 191 (1982)..... 18

Riley v. National Federation of the Blind, 487 U.S. 781 (1988)..... 21, 28

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)..... 18, 26

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 18

Sherman v. United States, 356 U.S. 369 (1958)..... 27

Thomas v. Collins, 323 U.S. 516 (1945) 21

United States v. United Foods, 533 U.S. 405 (2001)..... 4, 27

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Whitney v. California, 274 U.S. 357 (1927)..... 18

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INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, wire-services, and media-related professional and trade associations in the United States and abroad.[1] They share an interest in enforcing the First Amendment's prohibition against governmental interference in public debates. Indeed, many *Amici* are actively reporting on the globalization controversy that is at the center of this case, and most of Nike's communications to the press at issue here were sent to them. Because the California Supreme Court's extension of the "commercial speech" doctrine impermissibly intrudes on traditional methods of media coverage and public debate, *Amici* respectfully submit this brief in support of reversal.

SUMMARY OF ARGUMENT

I. The California Supreme Court's decision – which for the first time treats press releases, letters to the editor, and other types of submissions to the press as "commercial speech" that is subject to consumer protection law – seriously jeopardizes the media's ability to report on important issues regarding corporate America. Even a cursory review of prominent press coverage from the past few years reveals a vast array of corporate speech – on issues ranging from race discrimination to environmental sustainability to personal health and safety – that would now be subject to California's new strict liability dragnet. If the decision below is not reversed, business representatives will be deterred from

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

speaking to the press about these and other public issues. This chilling effect will deprive the public of access to important news stories and the clash of competing viewpoints that undergirds the First Amendment.

Equally pernicious, the California laws at issue here threaten to distort the business-related news that the press continues to cover. Although the California Supreme Court stated that certain inherent attributes of companies justify requiring their speakers "to make greater efforts to verify the truth of [their] statements" to the media and to prevent such statements from being potentially misleading, Pet. App. 22a, the First Amendment does not permit a state to disfavor one side of public debates in this manner. To the contrary, the Framers believed, and this Court has held, that the right to weigh the credibility of various public advocates must be left to the citizenry. Indeed, when, as here, certain organizations become the focus of public scrutiny because of their alleged lack of integrity or morality, courts should be especially intolerant of rules that would discourage such entities from speaking to the press to defend themselves.

II. Extending the definition of commercial speech beyond advertisements that do no more than propose commercial transactions to include corporate statements about publicly debated business operations is not only misguided, but it also is unnecessary. Commercial speech is subjected to reduced First Amendment protection to prevent "uninformed acquiescence," *Edenfield v. Fane,* 507 U.S. 761, 774-75 (1993) – that is, the harm that consumers may suffer if they respond to false product advertisements before there is an opportunity for counterspeech and reflection. But when a business practice becomes a matter of public concern, the media scrutinize corporate speech and typically place potentially misleading statements into context, thereby providing timely and corrective information.

That, in fact, is exactly what happened in this case. Respondent himself acknowledges that "[t]he media have continued to expose Nike's actual practices," First Amended Complaint (Petitioners' Lodging) ¶ 19, and an extended review of contemporaneous press coverage of Nike confirms that every one of Nike's allegedly misleading statements either was never reported or was challenged by counter-speech in the same media outlets in which they were printed. Under these circumstances – when the press provides consumers with competing information and time to reflect on it – the First Amendment prohibits states from making speakers on either side of a debate strictly liable for potentially deceptive or factually inaccurate statements.

Accordingly, this Court should make it clear that only speech, such as traditional product advertising, that does no more than propose a commercial transaction may be treated as commercial speech. Traditional product advertising is a "*business transaction* in which speech is an essential but subordinate component," *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 457 (1978) (emphasis added), but a company's speech regarding its corporate culture, such as Nike's speech here, is a *public statement* in which business is an essential but subordinate component. The ordinary checks on such public statements are able to mitigate the effects of any deceptive assertions they contain. Even when companies attempt to raise or defend their corporate culture or social image in advertising-type arenas, as Nike did here in its "editorial advertisements," the commercial element of such communications does not pertain to the actual performance or quality of products or services, or to the terms and conditions upon which they are available. Rather, these communications are aimed at swaying public opinion on a topic of public concern. As such, these social-image statements also should be afforded the full protection of the First Amendment.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S DECISION, IF AFFIRMED, WOULD INHIBIT THE MEDIA'S ABILITY TO REPORT ON ISSUES OF PUBLIC CONCERN REGARDING CORPORATE AMERICA.

A. The California Supreme Court's Definition of Commercial Speech Vastly Enlarges the Realm of Corporate Statements Subject to Regulation.

The California Supreme Court has taken a doctrine that this Court created to *expand* the First Amendment's protection of business speech and used it vastly to restrict companies' ability to participate in public debates. According to the decision below, speech is now "commercial" so long as it (i) is made by someone engaged in commerce "or someone acting on behalf of a person so engaged," Pet. App. 18a, such as an individual spokesperson or a trade association; (ii) is likely to reach potential buyers or customers; and (iii) involves descriptions of "business operations," employment or manufacturing policies, or other attempts to "enhance[] the image of [a company's] product or of its manufacturer or seller." Pet. App. 19a-20a. Petitioners have amply explained why this test is inconsistent with this Court's precedent, *see* Pet. for Cert. 10-15, but *Amici* wish to highlight three aspects of this new doctrine.

First, although this Court has "usually defined" commercial speech as that which "does no more than propose a commercial transaction" to consumers, *United States v. United Foods,* 533 U.S. 405, 409 (2001), the California Supreme Court explicitly held that commercial speech includes statements directed solely to reporters or newspaper editors in their capacities as newsgatherers. Pet. App. 4a, 18a. The California Supreme Court thus ruled that a business may be sued for consumer protection violations based on

answers given to reporters' questions, press releases, op-ed pieces or "editorial advertisements," regardless of whether the business's speech is printed or appears as part of a news story that includes opposing viewpoints.

Second, the California Supreme Court held that corporate communications to the media need not be false or even purposely or negligently misleading in order to be actionable. Pet. App. 7a. The Court ruled that such speech is unlawful – regardless of the speaker's intent or the public's actual knowledge – if it is "actually misleading *or* [it] has a capacity, likelihood *or* tendency to deceive *or* confuse the public." Pet. App. 7a (quoting *Leoni v. State Bar,* 704 P.2d 183, 194 (Cal. 1985)) (emphasis added); *see also Cortez v. Purolator Air Filtration Prods.,* 999 P.2d 706, 717 (Cal. 2000) (strict liability for deceptive practice under unfair trade practices law); *Chern v. Bank of Am.,* 544 P.2d 1310, 1316 (Cal. 1976) (same under false advertising law). Applied outside of traditional advertising arenas, this standard seemingly holds businesses strictly liable for ordinary "spin." If an executive or trade association granting an interview portrays a controversial business practice in the most favorable light – perhaps by omitting certain background details – then the statements may well have a "capacity . . . to deceive or confuse the public," thereby making them unlawful. What is more, it makes no difference whether the resulting media story clarifies these corporate statements or combines them with other speakers' allegations to create a balanced news story. As evidenced by Respondent's allegations in this case, it is the corporation's raw speech that provides the basis for punishment under California law, regardless whether the media repeat it or place it into context.

Third, although this Court has held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values," *Connick v. Myers,* 461 U.S. 138, 145 (1983) (quotation omitted), the California Supreme

Court ruled that "it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate" on an issue of intense national and international interest. Pet. App. 25a. In the California Supreme Court's view, when public debate turns to a company's services or "business operations," the company, but not its critics, may be held strictly liable if its public statements are determined to be potentially misleading or false. Pet. App. 25a-27a. Indeed, under that Court's through-the-looking-glass view of commercial speech, the *more* intense the media debate is regarding a company's business practice, the *more* likely it is that a company's statements will be subject to regulation and potential litigation. This is because issues regarding a company's business operations that are hotly debated naturally are more likely to affect purchasing decisions and the company's bottom line, and thus the company's joinder in the debate is more likely to be motivated in part by a desire to "maintain[] . . . profits and sales." Pet. App. 25a.

B. Application of California's Expanded Consumer Regulations Would Impair the Media's Ability to Cover Numerous Issues of Intense Public Concern.

Accurate and useful reporting depends on considering all sides of an issue. When a public debate concerns a company's business operations, attaining such a complete picture requires newsgatherers to get information not only from interest groups and the company's detractors, but also from the company itself. The First Amendment's protection of the press, in fact, "rests on the assumption" that gathering and disseminating "information from diverse and antagonistic sources" will best serve the public welfare. *Associated Press v. United States,* 326 U.S. 1, 20 (1945). Reporters regularly strive to obtain corporate statements on issues involving their businesses to ensure that their stories are complete. News stories that impart the view of each

opposing party are more likely to be deemed trustworthy or neutral by the reader or viewer.

The California law at issue here will seriously hamper the media's ability to obtain these critical business-oriented statements. As a general rule, any law that "impose[s] strict liability on [speakers] for false factual assertions" regarding public issues has "an undoubted 'chilling' effect" on valuable speech. *Hustler Magazine v. Falwell,* 485 U.S. 46, 52 (1988); *accord New York Times Co. v. Sullivan,* 376 U.S. 254, 277-78 (1964). This Court has held that the threat of liability has the same effect in the corporate context. If states could punish corporate speech on any public issue that "materially affected" the company's profitability:

> [m]uch valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk [those penalties]. . . . In addition, the burden and expense of litigating the issue – especially when what must be established is a complex and amorphous economic relationship – would unduly impinge on the exercise of the constitutional right. [T]he free dissemination of ideas [might] be the loser.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 n.21 (1978) (quotation omitted). California's expansion of the commercial speech doctrine presents exactly these risks.

Because issues concerning companies' business operations are increasingly fundamental to the world's social and political landscape, the withdrawal of corporate voices on those issues from the media would deprive the public of vital information. Nike, for example, is not the only multinational corporation whose labor policies in third world

countries have been the focus of public scrutiny. An executive from another company, Cutter & Buck, responded to allegations that its garments were made in overseas "sweatshops" by telling the media that "I have no objection to outside monitoring because I have every confidence our factories would pass." Les Blumenthal, *Combating Sweatshops: Not All Clothing Retailers Are Embracing Clinton's Plan To Have Voluntary Inspections of Overseas Clothing Factories,* The News Tribune (Tacoma, Wa.), April 15, 1997, at B4. Labor organizations sued the company, alleging that its executive's statement amounted to false advertising in the same way that Nike's speech did. First Amended Complaint ¶¶ 95 & 125, *Union of Needletrades Indus. & Textile Employees, et al. v. The Gap, Inc., et al.,* No. 300474 (Ca. Super. Sept. 23, 1999). Such lawsuits are sure to dampen public discourse on this issue.

In addition, media coverage of corporations' business operations goes far beyond labor policies in developing countries. A selection of recent news coverage reveals the extraordinary reach of the chilling effect that the California Supreme Court's decision would impose:

• Civil rights groups recently have alleged that several companies' practices of stocking different merchandise or requiring different forms of payment in predominantly minority communities amounts to invidious racial discrimination. When asked to explain why its "no check" policy appeared to be limited to stores in predominantly black neighborhoods, an executive for the parent company of KB Toys stated that despite using "check-acceptance services designed to screen for problem checks" in the pertinent stores, fraudulent check rates still "can be as high as 20 percent." Stephanie Stroughton, *Suit Alleges Bias by KB Toys,* Wash. Post, Dec. 16, 1999, at A1. Although facts like these are critical to the public debate over whether retail "red-lining" practices are wrong and should be

prohibited, the *Kasky* doctrine would hold that businesses contribute information to this debate at their peril.

• Prior to *Kasky*, it was accepted wisdom that "[i]f a real scientific debate about the health impact of a product exists, the manufacturer would retain a fully protected [First Amendment] right to comment on that debate" outside of its direct advertisements and product labels, "even though the likely and intended impact of the comment on the listener would be the creation of a desire to purchase that product." Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech,* 43 Vand. L. Rev. 1433, 1453 (1990). A passage from a recent magazine cover story evinces this principle:

> David Ludwig, director of the Obesity Program at Children's Hospital in Boston, says his research shows that "for every additional serving of soft drinks a day, a child's risk of becoming obese increases by 60 percent." Ludwig's soft drink study also suggests that calories from sugar-sweetened drinks do not seem to be as filling as calories from other foods. Soon after Ludwig's results hit the media, studies paid for by the National Soft Drink Association used government data to show that soft drinks do not cause obesity. "If you go through all the scientific evidence, you see there is no link between consumption and obesity," says Sean McBride of the NSDA. . . . This debate is only the beginning.

Amanda Spake & Mary Brophy Marcus, *The Fattening of America,* U.S. News & World Report, Aug. 19, 2002, at 46. Indeed, this debate already is spreading to the health effects of school lunches and of McDonald's-type fast food.

Because food and beverage manufacturers' speech on such health-related issues undoubtedly is in part driven by product image and economics, *Kasky* would restrict speech on one side of these disputes, thereby inhibiting the media's ability to compare both viewpoints in order to ferret out the truth.

• A similar controversy recently occurred in Oregon over a proposal to adopt a state law requiring labeling of genetically engineered foods. Interest groups supporting the initiative asserted that food companies are creating "Frankenfood" – that is, "something we can't control" – and that they are "like little kids playing with a chemistry set in a back bedroom." Brad Cain, *Labels for Genetically Altered Food Put to Vote,* Seattle Times, Aug. 12, 2002, at B2. A spokesman for food manufacturers responded that genetic alterations are "in all kinds of food, and there's never been a single case of illness or any other problem." *Id.* With consumer protection regime like California's in place, the spokesman may well have declined to offer such a response, and voters may have been deprived of this news coverage concerning an issue central to the proposed initiative.

• There also are heated public debates regarding sustainable environmental practices and whether people should support companies that treat natural resources in certain ways. Environmental groups, for instance, have called on consumers and chefs to boycott swordfish and sea bass on the ground that the seafood industry is over-fishing those species. But the industry says that boycotts are unnecessary because fishing companies' new, self-imposed quotas are sufficient to protect the ecosystem. Carolyn Jung, *Activists, Industry Debate Reason for Swordfish Comeback,* San Jose Mercury News, Oct. 16, 2002, at 1; Beth Daley, *Sea Bass Overfishing Tests Industry's Policing Ability,* Boston Globe, Aug. 21, 2002, at A1. Such give-and-take is critical to developing effective policies not only for oceans and rivers, but also for the world's forests and mines. *See, e.g.,*

Glen Martin, *Redwood Logging Firm Recognized for Sustainable Practices,* S.F. Chron., Nov. 17, 2000, at A11; Terry McCarthy, *Plumbing the Pasture,* Time, July 16, 2001, at 22. Yet "as public concern about the environment grows, there is an increasing acceptance in executive suites that industrial reform" concerning a wide range of practices "can be good for the environment *and* good for profits." Eric Roston, *New War on Waste,* Time, Aug. 26, 2002, at A28 (emphasis added). Hence, the economic component of these sustainability debates apparently makes them subject to California's strict liability regime.

• Finally, some important public debates occur between two businesses. Following a recent spate of accidents involving Ford Explorers, Bridgestone/Firestone alleged that "the real problem" derived from unsafe vehicles, while Ford "vehemently insist[ed] it [was] a tire problem." Terril Yue Jones, *Bridgestone Rejects Wider Recall Request,* L.A. Times, July 20, 2001, at B1. Although these companies' public descriptions of their safety tests were driven partly by a desire to protect their profitability, *id.*, they also imparted vital information to consumers in the automotive market. Under *Kasky,* however, such differing corporate statements provide fodder not only for tort lawsuits, but for "false advertising" claims as well. This type of threat may well deter the release of contemporaneous safety-related information the next time around, perhaps regarding air travel. *See* Sally B. Donnelly, *Just Plane Dangerous,* Time, Aug. 13, 2001 (dispute between airline and its repair company). Even if a company honestly believes its contested practice is safe or lawful, the prospect of immediate nuisance lawsuits – not to mention additional *Kasky*-based claims if a jury later disagrees with the company's public assessment of its practice, *see* Pet. App. 22a – could be too high a price to pay for defending it in the media.

The threat of liability under the decision below is so serious that businesses already have begun to constrict their lines of communication with the press. Business periodicals are advising companies that "[u]nless and until the U.S. Supreme Court reviews *Kasky* . . . [t]he safest course may be to make no reference at all to one's products, services, or business operations – but that may amount to saying nothing at all when one's industry is under general attack." Jonathan A. Loeb & Jeffrey A. Sklar, *Be Careful When Your Company Speaks,* AGS&K Business Report (visited Oct. 23, 2002) <http://www.alschuler.com/print/ brsum02.html>; *see also* Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech,* 16 No. 21 Andrews Del. Corp. Litig. Rep. 11 (2002) (urging corporate executives to devise "preventative systems" for vetting corporate communications and campaigns, "even those that are 'defensive' in nature"); Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak Their Minds,* Fortune, Sept. 2, 2002, at 102 (describing need for businesses to alter behavior as a result of *Kasky*).

There can be no doubt, in sum, that an affirmance here would transform the way that the media report on a vast array of public issues. Businesses, big and (even more so) small, would be deterred from speaking on issues concerning their operations, or they would offer only bland, indisputable claims, for fear of being held liable for good faith errors or unintended but potentially "misleading" implications. Spontaneous interviews also would be far less informative, for any alert business would rely on carefully crafted statements designed to keep it out of court. When news stories themselves center on media entities or media practices – such as the recent coverage of AOL Time Warner, the ultimate parent of *Amici* CNN and Time Inc., or the current debate over the cross-ownership and increasing consolidation of news outlets – the California laws here present still more

difficulties, for they render media companies and their trade or professional associations doubly subject to vexatious litigation. Media organizations, as business entities, are subject to liability for their public descriptions of their business operations. And media organizations, as publishers, are potentially subject to legal claims arising out of their coverage of their corporate parents that their competitors are not. The result of all this will be far less public information regarding important corporate issues, to the detriment both of businesses' supporters and their critics.

C. Nothing Inherent in Individuals' Pursuit of Corporate Interests Justifies Imposing Special Burdens on Their Ability to Participate in Public Debates.

The chilling effect that *Kasky* would impose on businesses' participation in public debates is, to a substantial extent, not even contested. It is an explicit goal of some interest groups supporting the decision. One "corporate watchdog group" has explained that "[i]f this case is successful, it could undermine the greenwashing strategies of a lot of corporations that attempt to promote a positive environmental or social image to undermine their critics and minimize the damage done to their brand." Josh Richman, *Greenwashing on Trial,* MotherJones.com (Feb. 23, 2001) <http://www.motherjones.com/web_exclusives/features/news/greenwash.html> (quoting Joshua Karliner, Executive Director of Corpwatch). After the California Supreme Court's decision was announced, an editorial that was widely circulated on anti-globalization websites declared that "[t]he ruling was a victory for the public interest and groups taking on powerful corporations and their image-makers." Jeff Milchen, *Bill of Rights Freedoms Belong to People, Not Corporations,* Pac. News Serv. (May 14, 2002) <http://www.news.pacificnews.org/news/view_article.html?article_id=300>. The *Kasky* decision, in other words, benefits anti-

globalization groups' public relations campaigns, not consumers.

The California Supreme Court essentially acknowledged as much. The Court conceded "that application of [its ruling] may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements." Pet. App. 22a. Making speakers more "cautious," as this Court has explained, is simply a euphemism for chilling speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). But the California Supreme Court, Respondent, and Respondent's supporters apparently believe that businesses' public statements – but not their critics' – may be subjected to strict liability rules because businesses are motivated in part by pecuniary interests and they supposedly have a superior ability to substantiate their press releases. Pet. App. 27a; Opp. to Pet. for Cert. 25.

The First Amendment does not permit a state to disfavor corporate speech in this manner. Companies that comment on public issues outside of direct product advertisements enjoy the First Amendment's "full panoply of protections," regardless of their motivations for doing so. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *see also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (power company has unrestricted First Amendment right to comment on debate over nuclear power). Indeed, in holding in *Bellotti* that corporations have an unfettered right to speak out on proposed legislation that would affect their finances, this Court made it plain that even when such speech is merely reprinted in an editorial advertisement, the public "may consider . . . the credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by [a business], it is a danger contemplated by the Framers of the First Amendment." *Id.* at 791-92. They believed that a commercial motivation – such as a "creditor[]" or

"manufacturing" interest – was perfectly legitimate, and that liberty and sound social policy would best be achieved by allowing a free press and an inquisitive public to weigh the unrestrained expression of *all* interested parties. Federalist No. 10 (Madison), at 58-60 (J. Cooke ed. 1961); *see also* Gordon S. Wood, The Radicalism of the American Revolution 336-37 (1992) (Framers encouraged open pursuit of all interests, including commercial interests).

The First Amendment's mandate that the media and the public, not the courts, evaluate the credibility of speakers in public debates should not be watered down during this period of heightened skepticism of corporate practices. When businesses speak out on public issues, the media are just as capable of evaluating and investigating their speech as anyone else's. And when the media run stories including factual assertions from businesses, the public's increased wariness of such assertions hardly provides reason to punish businesses for any inadvertent inaccuracies or unintended implications. The public is quite accustomed to dealing with potentially misleading speech from interest groups and politicians, whose motivations for speaking are often just as selfish as businesses', and whose reputations for unvarnished veracity are often just as suspect.

Indeed, if anything, it is now more important than ever that courts refrain from discouraging business representatives from speaking out on issues regarding their corporate cultures. News coverage and investigative journalism are frequently driven by clashes of competing points of view. Thus, when the media are unable to obtain corporate responses to allegations of misconduct, they may shelve such stories for fear of publishing something that is too one-sided, or simply for lack of an apparent controversy. The more often, in other words, the media get a "no comment" from business, the less often they may run stories on business-related issues. In this respect, an affirmance here

would have exactly the opposite effect than the California Supreme Court and its supporters intend. The inner workings of corporations would become less transparent, not more so.

This Court has confronted a situation presenting a similar danger before. The litigation that culminated in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) – which, like part of this case, was based on an "editorial advertisement" purchased in a newspaper – was "part of a concerted strategy" designed to chill press coverage of one side of a pressing public issue: the desegregationists' side of the civil rights movement. Fred D. Gray, *The* Sullivan *Case: A Direct Product of the Civil Rights Movement,* 42 Case W. Res. L. Rev. 1223, 1226 (1992). And like this case, the decision under review in *Sullivan* came from a region on the leading edge of one side of the debate. A state supreme court attempted to use one state's law effectively to regulate media coverage throughout the nation. *See* Anthony Lewis, New York Times v. Sullivan *Reconsidered,* 83 Colum. L. Rev. 603, 605 (1983).

One generation ago, this Court held in *Sullivan* that imposing strict liability in "one of the major public issues of our time" for speech containing falsehoods would undercut the First Amendment's basic purpose of assuring "uninhibited, robust, and wide-open" debate on such issues. 376 U.S. at 270-71. It is imperative that this Court refuse to allow the law of one state single-handedly to dry up information on one side of another major public debate, this time over corporate globalization.

II. EXPANSION OF THE COMMERCIAL SPEECH DOCTRINE BEYOND STATEMENTS THAT DO "NO MORE THAN PROPOSE A COMMERCIAL TRANSACTION" IS UNNECESSARY BECAUSE MEDIA COVERAGE ADEQUATELY INFORMS CONSUMERS REGARDING COMPANIES' CONTROVERSIAL BUSINESS PRACTICES.

The California Supreme Court's expansion of the commercial speech doctrine not only threatens to hamper media coverage of public issues regarding corporate America, but it does so for no good reason. One of this Court's principal justifications for curtailing the level of protection afforded to commercial speech is that such speech typically affords consumers little time or ability to scrutinize its truthfulness. While that logic may make sense in the realm of product labels and advertisements, it lacks any force whatsoever when the corporate speech at issue is directed toward the media in the context of an extended public debate. Indeed, the very press coverage of Nike that forms the backdrop of this case demonstrates that the media serve as an effective watchdog over corporate press releases and more than adequately counterbalance companies' assertions regarding controversial business operations. Accordingly, this Court should make it clear here that the universe of "commercial speech" cannot be expanded beyond companies' statements that do "no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976).

A. Corporate Communication with the Media, Unlike Traditional Product Advertising, Permits Public Scrutiny and Counterspeech.

This Court has explained that "[i]n assessing the potential for overreaching and undue influence" of speech, "the mode of communication makes all the difference."

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475 (1988). Hence, one of the main reasons that this Court affords commercial speech less First Amendment protection than other speech is that the public often "lacks sophistication" or access to the information necessary to evaluate a manufacturer's claim. *In re R.M.J.,* 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Ariz.,* 433 U.S. 350, 383 (1977)). When a company asserts that its product contains a certain ingredient, for example, that claim may not provide any realistic opportunity for factual or ideological debate. *See Rubin v. Coors Brewing Co.,* 514 U.S. 476, 496 (1995) (Stevens, J., concurring). Consumers, therefore, "may respond to [false advertisements] before there is time for more speech and considered reflection to minimize the risks of being misled." *Id.* Even within the realm of commercial speech, this Court has held that statements that are "more conducive to reflection and the exercise of choice on the part of the consumer" receive incrementally more First Amendment protection. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 642 (1985) (print advertisements more protected than personal solicitations); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 457-58 (1978) (same).

A corollary of this Court's inability-to-reflect rationale is that false or misleading speech in the "commercial" context may be regulated because it "lacks the value that sometimes inheres in false or misleading political speech." *Rubin,* 514 U.S. at 496 (Stevens, J., concurring). The usual rule is that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Sullivan,* 376 U.S. 279 n.19 (quoting John Stuart Mill, On Liberty 15 (Blackwell ed. 1947)); *see also Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied" to false political speech "is more speech, not enforced silence"). But in the sphere of product advertising,

the predominant goal is sales, not knowledge, and the time frame is short, not long. Thus, this Court has held that the regulation of misleading commercial speech prevents "uninformed acquiescence," *Edenfield v. Fane,* 507 U.S. 761, 774-75 (1993), because "the consumer is not expected to have the competence or access to information needed to question the advertiser's claim." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 156 (1996).

The California Supreme Court's extension of the commercial speech doctrine in this case rips the doctrine completely away from this underpinning. The decision holds that a business's speech is "commercial" even if it pertains merely to a company's social "image," Pet. App. 19a-20a, rather than to any actual product, and even if it pertains to an extended media debate, rather than an ephemeral purchasing decision.

This extension is wholly unjustified. Whatever force the inability-to-reflect rationale has when applied to consumers' evaluation of the tangible attributes of a product disappears in the context of debates over good corporate citizenship. By holding that consumers require "protection" from potentially misleading information pertaining to a company's social image, the California Supreme Court has applied a version of the "paternalistic approach" to commercial speech regulation that this Court long has rejected. *Virginia State Bd. of Pharmacy*, 425 U.S. at 770; *accord 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 496-98 (1996) (plurality opinion); *id.* at 520-23 (Thomas, J. concurring in the judgment). It is paternalistic to assume that consumers lack the ability or sophistication to decide for themselves whether a company's image reflects reality, or whether that image should influence their purchasing decision at all.

Furthermore, the California Supreme Court's decision obfuscates the press's role in the marketplace of ideas. This Court has long recognized that the press is "a mighty catalyst in . . . informing the citizenry of public events and occurrences." *Estes v. Texas,* 381 U.S. 532, 539 (1965). This is because the media do more than simply provide an empty vessel for third parties to disseminate their speech. *See Branzburg v. Hayes,* 408 U.S. 665, 729 (Stewart, J., dissenting). Rather, it is a core function of the press to consider the source of statements that it receives, as well as to investigate those statements' veracity and to set them beside the counterspeech of other interested parties. Thus, when a news organization receives a company's press release regarding its business operations, the organization can bring independent judgment to bear on the accuracy of the release. If a company's assertions are not credible, the media can, and sometimes do, decline to run any story on the subject. When media entities publish controversial claims by businesses (either because the claims are open to debate or because a publisher feels that the subject of a report is entitled to present its side of the story), they generally contrast those claims with independent analysis or opponents' counterclaims. *Cf. Gertz,* 418 U.S. at 344 (press provides means of "counteract[ing] false statements" regarding public figures). Unlike the typical advertising scenario, in short, potentially misleading corporate press releases in the course of a public debate are tempered by their clash with competing speech.

Even when the media reprint a business's speech in an op-ed or an editorial advertisement, that speech is very likely to be responsive to, or challenged by, other articles in the same publication. In contrast to advertisements that directly propose commercial transactions, companies usually do not take the trouble to purchase space to discuss their *business operations* unless those operations have become the subject of considerable public scrutiny. *Compare, e.g.,*

James Gleick, *Tangled Up in Spam,* N.Y. Times Magazine, Feb. 9, 2003, at 42 *with* Microsoft Corp., *Spiking the Spammers*, N.Y. Times, Feb. 13, 2003, at A33 (editorial advertisement); *see also Sullivan,* 376 U.S. at 266 (editorial advertisements are "an important outlet for the promulgation of information and ideas" by non-publishers). Certainly that was the case with Nike. Consequently, as with press releases, the media typically arm the public with the resources for full reflection on business practices discussed in op-eds and editorial advertisements.

Not only is the press effective in ventilating corporate speech and in unmasking misleading claims regarding issues of public concern, but it is the preferred means of doing so. "[S]elf-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *Bellotti,* 435 U.S. at 777 n.12 (quoting *Associated Press,* 326 U.S. at 20). Accordingly, "[t]he very purpose of the First Amendment is to foreclose [the government] from assuming guardianship of the public mind" through unnecessarily regulating the content of public debate. *Riley v. National Federation of the Blind,* 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J. concurring)). Whenever the press presents the public with adequate information to assess the accuracy of a speaker's claim, "*the people* in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of the conflicting arguments." *Bellotti,* 435 U.S. at 791 (emphasis added).

The California Supreme Court's decision here pretermits this entire process of ventilation and individual assessment. It holds that the moment a company sends a press release or letter to the media that offers a potentially misleading portrayal of the company's business operations, the company may be sued and held strictly liable. It does not matter whether the media ever print the company's

statements or, if they do, whether they place those statements in context or beside assertions refuting them. This holding impermissibly substitutes state regulation of the content of public debate for media scrutiny and counterspeech. What is more, the ruling handicaps the business side of all public debates regarding business issues, by "licens[ing] one side of a debate to fight freestyle, while requiring the other side to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 392 (1992). Especially in these circumstances, "the First Amendment is plainly offended." *Bellotti,* 435 U.S. at 785-86.

B. The Media Coverage of Nike at the Center of This Case Confirms That Subjecting Its Speech to Consumer Protection Laws Is Unnecessary and Inappropriate.

The record and the press coverage related to this case underscore the imprudence of the California Supreme Court's decision. Although the purported linchpin of Respondent's complaint is that Nike has deceived the public by making misleading statements to the press regarding its business operations, Respondent himself acknowledges that "[t]he media have continued to expose Nike's actual practices." First Amended Complaint (Petitioners' Lodging) ¶¶ 19; *see also id.* Exs. F-L (collecting some such articles). Indeed, a review of the contemporaneous press coverage of Nike during the controversy in the mid-1990's over its overseas manufacturing practices reveals that every single one of Nike's allegedly misleading statements either was never reported or was challenged by counterspeech in the same media outlet. This is what one would expect regarding an issue of intense public concern, and it leaves one at a loss to comprehend why state regulation is necessary or appropriate in this area.

Respondent complains about four statements that Nike made in press releases. The first one was a response to mounting protests in 1996 that Nike, as summarized in a column in *The New York Times*, "benefit[s] directly and indirectly from the systematic oppression of the Indonesian people" and that "Nike executives . . . are not bothered by the cries of the oppressed. It suits them. Each cry is a signal that their investment is paying off." Bob Herbert, *Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, at A29. Nike countered in its press release that it treated its overseas workers well and that the average line-workers' wage in Asian facilities was "double the government-mandated minimum." Compl. ¶ 46. Nike's release did not generate any immediate press reports. When the media eventually ran stories repeating Nike's double-the-minimum-wage claim, they generally stated in the same articles that the claim was potentially misleading. *Business Week*, for instance, reported that "Nike Chief Executive Philip H. Knight defends the Indonesian operations, saying that sneaker assemblers in Indonesia earn an average of double the minimum wage. But that's because they have no choice but to do overtime." Elisabeth Malkin, *Pangs of Conscience: Sweatshops Haunt U.S. Consumers,* Business Week, July 29, 1996, at 46. The *San Francisco Chronicle*, the leading newspaper in Respondent's hometown, further noted in an article printing Nike's claim that developing countries "deliberately set [minimum wages] below the subsistence level" and that a human rights group was asserting that Nike pressured such countries into denying overtime and keeping worker pay artificially low. Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. Chron., June 27, 1996, at A19.

Respondent also complains about Nike's statement in the same press release that it provided "free meals" to its employees. Compl. ¶ 52. But when the *San Francisco Chronicle* investigated this claim, it reported that despite such promises, a factory in Indonesia "started deducting 25

cents-a-day from workers' daily wages as a charge for the cost of lunch." Julia Angwin, *The Tired Souls Behind Nike Soles: Indonesian Worker Tells of Suffering,* S.F. Chron., July 26, 1996, at B3. When a representative business periodical repeated Nike's assertion, it also noted that other groups, "on the other hand, are concerned about persistent reports of exploitative conditions." Andy Zipser, *Nike: Shareholders Will Be Sweating It Out, Too,* Barron's, Sept. 16, 1996, at 10.

Coverage of Nike's two other allegedly misleading assertions in press releases followed a similar pattern of point and counterpoint. Nike's representation that its "expatriates ensure safe working conditions and prevent illegal working conditions, Compl. ¶ 28, was quickly challenged in a nationally televised segment on CBS's news magazine *48 Hours.* The story recounted "a fair number of incidents of physical abuse of workers" in violation of local regulations at Nike's Asian factories and suggested that Nike exercised very little control over supervisors of those factories. *48 Hours: Just Doing It* (CBS television broadcast, Oct. 17, 1996), *transcript available at* <http://www.saigon.com/~nike/48hrfmt.htm>. A *Time* magazine article added that Nike had a "credibility problem" on this issue because even if factory owners truly abide by "the Indonesian government's labor standards[, that] is saying very little" because those standards condone such dubious practices as child labor. Nancy Gibbs, *Cause Celeb: Two High-Profile Endorsers Are Props in a Worldwide Debate Over Sweatshops and the Use of Child Labor*, Time, June 17, 1996.

Nike's final contested press release – in which it asserted it guaranteed "a living wage for all workers," Compl. ¶ 62 – was issued about one year later, in response to renewed allegations against the company. In the fall of 1997, leading newspapers reported that a coalition of women's

groups was charging that Nike's Asian female employees "often suffer from inadequate wages, corporal punishment, forced overtime and/or sexual harassment." Steven Greenhouse, *Nike Supports Women In Its Ads, But Not Its Factories, Groups Say,* N.Y. Times, Oct. 26, 1997, at A30; *see also* Dottie Enrico, *Women's Groups Pressure Nike on Labor Practices,* USA Today, Oct. 27, 1997, at B2. (By this time, several Internet sites also were collecting and posting negative press coverage of Nike in order to combat, as one such website entitled "Boycott Nike" put it, Nike's "progressive image." *Boycott Nike* (visited Feb. 12, 2003) <http://www.saigon.com/~nike/nike.html>.) After Nike issued its responsive press release, a typical media story repeating Nike's "living wage" claim also included an assertion from an interest group that "Nike's workers in Vietnam could 'barely afford three meals a day let alone transportation, rent, clothing, health care, and much more.'" *Nike's Treatment of Women Overseas Assailed; Spokesman Defends Pay,* Dallas Morning News, Nov. 2, 1997, at A44. An ESPN television documentary that later aired on the issue also directly challenged Nike's claim. *See* Compl. ¶ 64 (describing *Outside the Lines: Made in Vietnam: The American Sneaker Controversy,* ESPN television broadcast, April 2 & 11, 1998)).

Nike's letters to the editor and editorial advertisement that Respondent complains of also met with vigorous concurrent counterspeech. Nike's letter to the editor of *The New York Times,* in which it claimed that it provided employees "free meals, housing and health care," Compl. ¶ 52, appeared amidst several scathing editorials in that newspaper – as well as in one of Respondent's local papers – concerning Nike's overseas business practices. *See* Bob Herbert, *Nike's Pyramid Scheme,* N.Y. Times, June 10, 1996, at A17; Bob Herbert, *Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, at A29; Bob Herbert, *From Sweatshops to Aerobics,* N.Y. Times, June 24, 1996, at A15; Bob Herbert,

Trampled Dreams, July 12, 1996, at A27; Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. Examiner, June 27, 1996, at A19. Nike's editorial advertisement asserting that it was "doing a good job" and "operating morally," Compl. ¶ 58, appeared during this same time period and on the same day (June 24, 1997) as one of Mr. Herbert's columns. It was followed later by another editorial in the *San Francisco Chronicle* claiming that "Nike's hypocrisy knows no bounds." Tim Keown, *Hypocrisy is Nike's Sole Purpose,* S.F. Chron., Dec. 14, 1997, at E1.

In light of all of this contemporaneous and easily accessible press coverage, it is difficult to understand how consumers could have been misled by any inaccuracies in Nike's speech. At the very least, any person who wished to factor Nike's labor practices into her purchasing decisions would have been alerted that serious allegations had been leveled against Nike and that Nike's credibility was being questioned. If consumers believed Nike's statements, it was not because they lacked the ability to reflect on the ongoing controversy or because they lacked access to "more speech" challenging Nike's assertions. *See Rubin,* 514 U.S. at 496 (Stevens, J., concurring); *Ohralik,* 436 U.S. at 457-58. Nor was it because any party's false statements did not "make a valuable contribution to the debate" by triggering additional investigation and corrective speech. *Sullivan,* 376 U.S. at 279 n.19. In the classic mode of public discourse on a controversial issue, the media ventilated competing claims and provided the people with information that allowed them to draw their own conclusions. The California Supreme Court's decision rendering such press coverage inadequate tramples basic First Amendment principles.

C. This Court Should Make Clear That Speech That Does More Than Propose a Commercial Transaction Cannot Be Treated as Commercial Speech.

The California Supreme Court's decision illustrates the damage that can occur when this Court's rules governing free expression are less than plain. This Court has long observed that statutory schemes that regulate speech are bound to chill valuable discourse if they contain opaque standards that keep people guessing as to whether certain statements fall within their ambit. *See, e.g., NAACP v. Button,* 371 U.S. 415, 432-33 (1963) ("precision must be the touchstone" in regulating First Amendment freedoms). The same is true of this Court's decisions in this realm. Whenever possible, this Court should "clearly inform" lower courts and the public whether and how certain categories of speech may be regulated. *Keyishian v. Board of Regents,* 385 U.S. 589, 604 (1967). And when initial explanations from this Court fail to provide adequate guidance, "the Court should not rest on [its] first attempt at an explanation for what sound instinct counsels. It should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued." *Sherman v. United States,* 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring).

Such reexamination is in order here, for this Court's jurisprudence defining what expression constitutes commercial speech does not currently provide the unambiguous direction that the First Amendment demands. In the seminal *Virginia State Bd. of Pharmacy* decision, this Court defined commercial speech as that which "does no more than propose a commercial transaction." 425 U.S. at 762 (quotation omitted). But this Court has since muddied the waters by suggesting that alternative tests might sometimes be relevant. *See United Foods,* 533 U.S. at 409 (commercial speech is

"usually defined" by the "no more than" test); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (noting that this Court termed "a somewhat larger category" of speech as commercial in *Central Hudson* decision); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) ("expression related solely to the economic interests of the speaker and its audience" is commercial); *Bolger*, 463 U.S. at 66-67 (looking to a still different "combination" of factors). Various lower courts now employ inconsistent standards in determining which speech is commercial. *See* Br. *Amicus Curiae* of Chamber of Commerce of U.S. in Support of Pet. for Cert. at 5-8.

The media are especially affected by this uncertainty. Reporters need to operate in a legal landscape in which sources, including business leaders, are assured that innocent misstatements or unintentionally misleading remarks will not subject their companies to lawsuits. Even when business personnel are not caught off guard by a request for an interview, such persons need to be able to impart information to the media with a clear understanding of legal rules governing their statements.

Accordingly, this Court should hold here unequivocally that only speech that does no more than propose a commercial transaction – that is, speech that does no more than promote tangible qualities of a product or service in a traditional advertising format – may be treated as commercial speech and subjected to strict liability rules such as the California laws at issue here. Corporate statements that are directed to the press or the public outside of a traditional advertising format are best characterized as imparting a business point of view on an issue of public concern, even if those statements include references to the company's products or services. *See Riley*, 487 U.S. at 796 (1988) (commercial speech that is "inextricably intertwined with otherwise fully protected speech" must be treated the

same as other public discourse). The ordinary checks on public statements will adequately correct any deceptive assertions in such statements.

Even when companies attempt to raise or defend their corporate social image in advertising-type arenas, as Nike did here in its editorial advertisements, such companies are not exhorting the public to buy their products in a way that triggers the need to punish them for any misleading messages they may convey. Governments may punish commercial speech more readily than non-commercial speech only in order to "protect[] consumers," *Ohralik*, 436 U.S. at 460, or to "prevent[] commercial harms." *Discovery Network*, 507 U.S. at 426. If these objectives are to have any meaning (and any limit) in our modern society, they must pertain only to tangible aspects of products and services – whether shoes are actually leather or whether they actually are on sale for $75. Although some consumers may be influenced in their purchasing decisions by a company's social image or its labor or environmental practices, misleading statements regarding those practices do not pertain to the actual performance or quality of products, or to the terms and conditions upon which they are available.

Put another way, traditional advertising or solicitation is a "*business transaction* in which speech is an essential but subordinate component," *Ohralik*, 436 U.S. at 457 (emphasis added), but a company's speech regarding its corporate culture, such as Nike's speech here, is a *public statement* in which business is an essential but subordinate component. When a company's public statements are designed in part to participate in such public debates, this Court should refuse to allow a state to substitute a strict-liability consumer-protection regime for the First Amendment's preferred process of investigation, counterspeech and reflection.

CONCLUSION

For the foregoing reasons, the decision of the California Supreme Court should be reversed.

Respectfully submitted,

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Appendix B]

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APPENDIX A

Descriptions of *Amici*

ABC, Inc., alone and through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20* and *Nightline*.

American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books. It disseminates information about dangers to free expression on its website, www.abffe.com. ABFFE also publishes a monthly newsletter, which it distributes to subscribers, and makes other publications available to the public through its on-line store. ABFFE has hundreds of bookseller members who are located from coast to coast.

American Business Media, founded in 1906, is the business-to-business industry association for global information providers that represent magazines, websites, trade shows, conferences, newsletters, and other media. These member companies reach an audience of more than 88.9 million professionals and generate more than $239 billion in industry revenues.

The American Society of Newspaper Editors (ASNE) is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society

include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Associated Press, founded in 1848, is world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

Belo Corp. is a media company with a diversified, market-leading group of television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.9% of U.S. television households, and publishes four daily newspapers with a combined daily circulation of approximately 900,000 and a combined Sunday circulation of almost 1.3 million in the United States. In addition, Belo owns or operates six cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes thirty-four internet websites, several interactive alliances and a broad range of Internet-based products.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of 1600 reporters in eighty-seven bureaus around the world, including two in California. Bloomberg News publishes more than 4000 news stories each day, electronically delivering business, financial

and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional System, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing business news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles a year; Bloomberg Magazines, which publishes twelve different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes* and *48 Hours*. CBS owns and operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to fifteen cable and satellite television networks; twelve Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than one billion people in more than 212 countries and territories.

The California First Amendment Coalition, established in 1988, is a California nonprofit public benefit corp-

oration and a 501(c)(3) charitable organization whose purpose is to "promote and defend the people's right to know." Its board of directors includes representatives of the California Newspaper Publishers Association, California Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, and Associated Press News Executives Council, as well as public members with experience in government agencies, citizen interest groups and higher education.

California Newspaper Publishers Association is a trade association representing about 500 daily and weekly newspapers. The CNPA, for well over a century, has stood in defense of the rights guaranteed by the First Amendment.

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news and operates an international news service.

Daily News, L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000, primarily in the New York City metropolitan area. The *Daily News* provides daily coverage of news events throughout the United States and the world. Its stories are also available on the Internet through its website, www.nydailynews.com.

Dow Jones & Company, Inc. is the publisher of, *inter alia*, *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, a news site on the world wide web with over 650,000 paying subscribers; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper of business and finance; and, through its Ottaway Newspaper, Inc. subsidiary, more than twenty daily and weekly newspapers.

Forbes, Inc. is the publisher of *Forbes*, the nation's leading business magazine and its international edition, *Forbes Global*, which together reach a worldwide audience of nearly five million readers. The company also publishes *Forbes FYI*, the irreverent lifestyle supplement. Other company divisions include: Forbes.com, the company's Internet business; Forbes Management Conference Group; Forbes Custom Communications partners; and American Heritage, publisher of *American Heritage* magazine and two quarterlies, *American Legacy* and *American Heritage of Invention & Technology*.

Fox Entertainment Group, Inc., through its subsidiaries, owns and operates the Fox News Channel, the Fox Broadcasting Company television network, and thirty-five local broadcast television stations that gather, produce and report news to the public.

Freedom Communications, Inc., headquartered in Irvine, California, is a diversified media company of newspapers, television broadcast stations and Internet-based businesses.

Freedom to Read Foundation ("FTRF") is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to help shape legal precedent for the freedom to read on behalf of all citizens.

Gannett Company, Inc. is an international news and information company that publishes ninety-four daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a

weekly newspaper magazine with a circulation of 23.6 million. The company also operates more than one hundred web sites and a national news service. Gannett's twenty-two television stations cover 17.7 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1.4 million daily and 1.9 million on Sunday.

National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade organization

that serves and represents radio and television stations and networks. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities and the activities of government.

National Broadcasting Company, Inc. is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels.

National Public Radio, Inc. (NPR) is a non-profit organization incorporated in the District of Columbia. It is a membership organization composed of more than 680 public radio stations located throughout the United States and serves a growing broadcast audience of over 19 million Americans weekly. NPR gathers and reports the news through its award winning programs, including *Morning Edition*, *All Things Considered*, and *Talk of the Nation*. It also distributes its broadcast programming on-line, adding additional news features, and distributes its broadcasts worldwide through satellite and cable distribution, and to U.S. military installations via the American Forces Network.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the

United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

PR Newswire Association LLC, www.prnewswire.com, a subsidiary of United Business Media plc, provides electronic distribution, targeting and measurement services on behalf of some 40,000 customers worldwide who seek to reach the news media, the investment community and the general public with their up-to-the-minute, full-text news developments. Established in 1954, PR Newswire has offices in fourteen countries and routinely sends its customers' news to outlets in 135 countries in twenty-seven languages. Utilizing the latest in communications technology, PR Newswire content is considered a mainstay among news reporters and investors as well as increasing numbers of private individuals.

Radio-Television News Directors Association (RTNDA) is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than thirty countries.

Reed Elsevier Inc. is a prominent publisher of information products and services for the business, professional and academic communities, including scientific journals, legal, educational, medical and business information, refrence books and textbooks, and business magazines.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The Seattle Times Company publishes four newspapers in the State of Washington: *The Seattle Times*, Washington's most widely circulated daily newspaper; the *Yakima Herald-Republic*; the *Walla Walla Union Bulletin*; and *The Issaquah Press*. It also publishes four newspapers in Maine: the *Portland Press Herald/Maine Sunday Telegram*, Maine's largest daily newspaper; the *Kennebec Journal*; the central Maine *Morning Sentinel*; and the *Coastal Journal*.

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media.

Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.* Time Inc. is indirectly wholly-owned by AOL Time Warner Inc.

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers including the *Los Angeles Times, Chicago Tribune, Baltimore Sun, Newsday, Orlando Sentinel,* and *Hartford Courant*; owns and operates twenty-four major market television stations including KCPQ and KTWB (Seattle), KXTL (Sacramento), KTLA (Los Angeles), and KSWB (San Diego), and two radio stations; and operates a network of local and national n ws and information websites throughout the United States.

U.S. News & World Report, L.P. publishes *U.S. News & World Report*, a weekly, national newsmagazine devoted to investigative journalism, reporting and the analysis of national and international affairs, politics, business, health, science, technology, and social trends. Through its rankings of America's Best Colleges, America's Best Graduate Schools and America's Best Hospitals as well as its News You Can Use brand, *U.S. News* has earned a reputation as the leading provider of service news and information. *U.S. News* is rated the most credible newsweekly by the Pew Research Center for the People & the Press. *U.S. News* is available online at www.usnews.com.

The Washington Post Company publishes the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

APPENDIX B

Of Counsel Listing

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